SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JUL 12 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1866

FRED TURETSKY,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the New York Supreme Court, Appellate Division, First Department

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD H. KUH
District Attorney
New York County
Attorney for Respondent
155 Leonard Street
New York, New York 10013
(212) 732-7300

LEWIS R. FRIEDMAN
ROBERT A. GOLDSCHLAG
Assistant District Attorneys
Of Counsel

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Jurisdiction	2
Statement of the Case	2
Argument	
Point I—The petition is untimely	5
Point II—Petitioner's specious claim that his Fourth Amendment rights were violated when the individual from whom he solicited a bribe recorded their conversation does not present a substantial federal question worthy of review by this Court	6
Conclusion	8

TABLE OF AUTHORITIES

PAGE

Cases:

American Railway Express Co. v. Levee, 263 U.S. 19 (1923) 5

Berenzi v. Immigration Director, 385 U.S. 630 (1967) 7

Conboy v. First Nat'l Bank, 203 U.S. 141 (1906) 5

Department of Banking v. Pink, 317 U.S. 264 (1924) 5

Fox Film Corp. v. Muller, 296 U.S. 207 (1935) 7

Grayson v. Harris, 267 U.S. 352 (1925) 7

People v. Muller, 11 N.Y.2d 154, 227 N.Y.S.2d 421, 182 N.E. 2d 99 (1962) 6

People v. Turetsky, 37 A.D.2d 1046 (1st Dept.), 326 N.Y.S.2d 369 (1971) 4

Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) 7

United States v. Johnston, 268 U.S. 220 (1925) 7

United States v. White, 401 U.S. 745 (1971) 6, 7

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1866

FRED TURETSKY,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the New York Supreme Court, Appellate Division, First Department

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

Fred Turetsky seeks certiorari to review an order of the New York Supreme Court, Appellate Division, First Department, rendered November 9, 1971, which unanimously affirmed, without opinion, a judgment of the Supreme Court of the State of New York, New York County, convicting him, after a jury trial, of BRIBE RECEIVING (New York Penal Law §200.10), PETIT LARCENY (New York Penal Law

§§110.00, 155.25), and sentencing him to probation for five years. On December 3, 1971, then Associate Judge JOHN F. SCILEPPI, denied petitioner's application for permission to appeal to the New York Court of Appeals, and on March 14, 1974, Chief Judge CHARLES BREITEL denied leave to appeal a second time, following an application to reconsider the earlier decision.

Jurisdiction

The petitioner invokes jurisdiction of this Court pursuant to 28 U.S.C. §1257(3).

Statement of the Case

In 1969, the petitioner, Fred Turetsky, was tried for soliciting a bribe from a businessman, Jay Shaw. The evidence showed that on the morning of June 2, 1969, Jay Shaw was supervising the renovation of his brownstone dwelling in Manhattan, when then Police Sergeant Fred Turetskey, entered the building. Turetsky told Shaw that in exchange for $40 a month none of the police officers in the local precinct would issue him tickets for violations caused by the renovation. Shaw delayed giving Turetsky an answer, and the following day he contacted the Chief Inspector's Investigating Unit of the Police Department.

This unit promptly dispatched three of its officers, Captain William Fitzgerald, Lieutenant James Slevin and Sergeant Francis Lynch, to meet Shaw. After Shaw explained the situation to them, they escorted Mr. Shaw back to his

building where they gave him a tape recorder and three $20 bills whose serial numbers had been recorded.

Turetsky returned to the premises a few minutes later and, as Shaw testified at trial, reiterated his demands for money. He explained to Shaw at great length that he was demanding $40 a month for each of the four months of the renovation in return for certain "courtesies"—immunity from tickets for violations of law in connection with Shaw's building construction. Turetsky insisted that the amount of money was justified because other sergeants in the precinct would have to be cut in. Shaw gave Turetsky, as a down payment on the $160 bribe, the same three $20 bills that had been given him by the officers from the Investigating Unit.

Turetsky left the building but was promptly stopped by Captain Fitzgerald. Turetsky, realizing that he had been caught in the act, attempted to finagle his way out by saying to the captain, "Can't we straighten this thing out?" When the captain made it plain that he would not be deterred in his duty, the petitioner turned and said to Shaw: "You are a Jew and I am a Jew, why don't we forget this?" But Shaw would not be swayed either. So the petitioner, in an act of desperation, reached into his pocket and, as Captain Fitzgerald described it, made a backward motion with his hand. Shaw saw that the petitioner was throwing the money to the ground. Lieutenant Slevin picked up the money, three $20 bills, with the same serial numbers as those given to Shaw. At the trial, the People introduced the recordings made by Shaw of his conversation with petitioner. They showed that Turetsky

expounded at great length as to the amount, whys and therefores of the bribe.

The theory of the defense was that Turetsky visited Shaw's place on June 3rd to fill out a temporary building permit, a UF-14 card, concerning the building's renovation; and it introduced into evidence the UF-14 card Turetsky allegedly had filled out on that date. It contained, *inter alia*, Shaw's telephone number. On rebuttal, however, the People introduced into evidence the telephone company's records which showed that this telephone number had not been assigned to Shaw until September of that year, three months after the arrest.

At the conclusion of the trial the jury convicted petitioner of bribe receiving, petit larceny and attempted petit larceny and, on January 7, 1970, he was sentenced to five years' probation. Thereafter, on November 9, 1971, the Appellate Division of the Supreme Court of the State of New York, First Department, affirmed the judgment, without opinion. *People* v. *Turetsky*, 37 A.D.2d 1046 (1st Dept.), 326 N.Y.S.2d 369 (1971). Leave to appeal to the New York Court of Appeals was denied on December 3, 1971 by then Associate Judge JOHN F. SCILEPPI.

For some two and a half years Turetsky took no steps to challenge the judgment of conviction. Then, in a letter dated March 4, 1974, he applied for reconsideration of his application for leave to appeal to the New York Court of Appeals. On March 14, 1974, Chief Judge CHARLES BREITEL denied leave to appeal.

On June 12, 1974, Turetsky served the instant petition for a writ of certiorari, arguing that his Fourth Amendment rights were violated by the introduction into evidence of his recorded conversation with Shaw and that the evidence against him was manufactured to deter him from fulfilling his duties as a police officer.

ARGUMENT

POINT I

The petition is untimely.

Petitioner's application for leave to appeal to the New York Court of Appeals was denied on December 3, 1971. The 90 days in which he had to file his petition [Rule 22] began to run from that date. *American Railway Express Co.* v. *Levee*, 263 U.S. 19, 20-21 (1923). The instant petition was not filed for some two and one-half years and is, therefore, untimely. Although no attempt to explain the untimeliness of his petition is made, Turetsky apparently justifies the filing date because the petition was filed within 90 days after his second application for leave to appeal to the Court of Appeals was denied.

While the filing of an application for rehearing in the state court tolls the time within which the petition for certiorari must be filed [*Department of Banking* v. *Pink*, 317 U.S. 264, 266 (1924)], in the absence of a state rule setting the time to file for a rehearing, such application must be made before the time to take the case to this Court expires. *Conboy* v. *First Nat'l Bank*, 203 U.S. 141, 145 (1906). Since New York does not have a time limitation

within which to file for reconsideration of applications for leave to appeal [*see People* v. *Muller,* 11 N.Y.2d 154, 227 N.Y.S.2d 421, 182 N.E.2d 99 (1962)]. Petitioner's failure to file for reconsideration within 90 days after the first application was denied, renders this petition untimely.

POINT II

Petitioner's specious claim that his Fourth Amendment rights were violated when the individual from whom he solicited a bribe recorded their conversation does not present a substantial federal question worthy of review by this Court.

Petitioner argues that certiorari should be granted because Jay Shaw, using a tape recorder supplied by the police, recorded a conversation in which Turetsky solicited a bribe. In effect, he argues that this Court should reconsider its decision in *United States* v. *White,* 401 U.S. 745 (1971), where five Justices of this Court held that recording or intercepting a conversation by law enforcement officials, with the consent of one party to the conversation, does not violate the Fourth Amendment.

Petitioner has not shown that the federal question posed in this petition was raised or passed upon in either the trial court or in the Appellate Division of the Supreme Court. Indeed, the issue presented to this Court appears to have been argued by petitioner for the first time in his application for a reconsideration of his request for leave to appeal to the New York Court of Appeals. Since the federal question was not passed upon by the Appellate Division, the court at which the petition for certiorari is

addressed, this petition should be denied. *See Fox Film Corp.* v. *Muller,* 296 U.S. 207 (1935).

Moreover, certiorari should not be granted if the question raised has previously been determined by the Court or is lacking in substance; there must be "[s]pecial and important reasons to warrant the exercise of discretion." *Rice* v. *Sioux City Cemetery,* 349 U.S. 70 (1955). The questions raised by Turetsky's petition are neither novel nor "special" and have recently been rejected by this Court in *United States* v. *White, supra.*

Additionally, petitioner maintains that "he was the victim of entrapment" by Shaw who allegedly was "seeking to bring charges against a completely innocent police officer (Turetsky) because the latter was trying to do his duty too diligently" (petition, pp. 17, 18).

Although using the nomenclature "entrapment," Turetsky in fact claims that the testimony against him was concocted and that the witnesses against him committed perjury. Rather than raising a federal constitutional question, this argument presents a question of fact. Certiorari will not be granted solely to review evidence and discuss facts. *Berenzi* v. *Immigration Director,* 385 U.S. 630 (1967); *United States* v. *Johnston,* 268 U.S. 220 (1925); *Grayson* v. *Harris,* 267 U.S. 352 (1925).

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD H. KUH
District Attorney
New York County

LEWIS R. FRIEDMAN
ROBERT A. GOLDSCHLAG
Assistant District Attorneys
Of Counsel

July, 1974